the Ordinance. I answer the third issue in the affirmative.

Before making any formal Order on the Originating Summons which gives rise to these proceedings I wish to give counsel an opportunity of addressing me should they so wish on the form the Order should take having regard to my findings on the three issues.

Order accordingly.

ABDUL HAMEED MOHAMED IBRAHIM & CO.
v.
A. M. S. NAINAM SAHIB & COMPANY.

[Court of Appeal (Foster Sutton, C.J., Taylor and Russell JJ.) April 16, 1951]

[F.M. — Civil Appeal No. 53 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 4(2)(b)(ii) — Demand for payment — Onus of proof.

The appellants in this case were the defendants in an action commenced by way of a specially endorsed writ claiming the balance of an account alleged to be due and owing to the plaintiffs by the defendants. The amount said to be owing was in respect of a "pre-occupation debt" within the meaning of section 2(1) of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

The defendants denied liability, alleging that the debt had been paid during the occupation period pursuant to a demand for payment made for and on behalf of the Plaintiff-Respondent Company.

On behalf of the appellant it was argued that the trial Judge misdirected himself as to whom the onus of proof lay, that the burden of proof was upon the plaintiffs to prove that the money in question was paid without demand and that such burden had not been discharged.

Held, that where the plaintiff is seeking to obtain a revaluation under section 4(2)(b)(ii) of the Debtor and Creditor (Occupation Period) Ordinance, 1948, of a payment made to him by the defendant, the onus of proof that no demand was made is upon the plaintiff, but the burden of proof may shift to the defendant.

Cases referred to:—

(1) *Abrath v. North Eastern Railway Company* 11 Q.B.D. p. 440 at 456 — 457.

(2) *Arunasalam v. Ng Tai Nyong* (1950) M.L.J. 199; 1 M.L.R. 158.

COURT OF APPEAL.

F. G. Pooley for the appellants.

R. D. Hume for the respondents.

Cur. Adv. Vult.

Foster Sutton, C.J.: — The appellants in this case were the defendants in an action commenced by way of a specially endorsed writ claiming the balance of an account alleged to be due and owing to the plaintiffs by the defendants. The amount said to be owing was in respect of a "pre-occupation debt" within the meaning of section 2(1) of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

The defendants denied liability, alleging that the debt had been paid during the occupation period pursuant to a demand for payment made for and on behalf of the Plaintiff-Respondent Company.

It was common ground that the payment was made in occupation currency on the 6th February, 1945.

On behalf of the appellants it was argued that the trial Judge misdirected himself as to where the onus of proof lay, that the burden of proof was upon the plaintiffs to prove that the money in question was paid without demand and that such burden had not been discharged.

Section 4(1) of the Ordinance provides, *inter alia*, that, subject to the provisions of sub-section (2) of the section, where a payment was made during the occupation period, in occupation currency, and such payment was in respect of a pre-occupation debt, "such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment". Sub-section (2) of the section provides, *inter alia*, that, where such payment was made after the 31st December, 1943, and the amount was due but "was not demanded by the creditor or by his agent on his behalf", or if due and demanded was not paid within three months of the demand, such payment shall be revalued in accordance with the scale in the schedule to the Ordinance and shall be a valid discharge of the debt but only to the extent of the amount as revalued. It follows, therefore, that unless the case could be shown to come within the exception referred to, the amount paid by the defendants was a valid discharge of their debt to the plaintiffs.

The plaintiffs were seeking the protection provided by the exception, and the burden of proof that no demand was made clearly rested upon them. In a sense they were required to prove a negative, but if the assertion of a negative is an essential part of a plaintiff's case the proof of the assertion still rests upon him. As Bowen, L.J. said in *Abrath v. North Eastern Railway Company*[1]:—

"Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively."

At the conclusion of the evidence there was a conflict as to whether or not a demand for payment had been made within the three months immediately preceding the payment, and it was the duty of the trial Judge to determine whether, on the case as a whole,

and having regard to all the circumstances and probabilities, he ought to act upon the supposition that no demand had been made within that period.

During the course of the plaintiffs' case, two letters were tendered in evidence, the first dated 10th August, 1942, and the second 23rd June, 1943, each of which "requested" payment of the amount due, but it was their case that no further demand for payment had been made after the date of the second letter, and evidence was called to that effect. On behalf of the defendants, one witness was called who gave evidence to the effect that the manager of the plaintiffs' firm had orally demanded payment of the account on several occasions in 1944, and it was further alleged that the last demand was made at the "end of 1944".

It is clear from the scale contained in the schedule to the Debtor and Creditor (Occupation Period) Ordinance, 1948, that the Legislature were of the opinion that occupation currency was rapidly deteriorating at the end of 1944. If the scale is anything like a correct estimate of the value of occupation currency in 1944, it seems odd that the plaintiffs should have chosen that time to insist upon payment. As the trial Judge remarked: "it was very much to the defendants' advantage to make payment at a time when the Japanese currency was very much inflated and of little value."

Immediately after hearing the arguments of the Advocates representing the parties, the trial Judge delivered an oral judgment, during the course of which he made references to the question as to where the onus of proof lay, and I have little doubt that those references were the *raison detre* for this appeal.

At the trial the question of onus was not, however, argued by the Advocates. The plaintiffs' case was, in my view, rightly conducted on the footing that they had to prove affirmatively that no demand for payment was made within the three months immediately preceding the 6th of February, 1945, and the defendants sought to disprove that assertion.

The trial Judge found as a fact that no demand for payment was made by the plaintiffs within the relevant period, and gave judgment accordingly. In my opinion, the plaintiffs established, by a preponderance of evidence in their favour, that no demand for payment was made within the period in question, and I do not see how the trial Judge could have come to any other conclusion. That being so, this appeal must be dismissed with costs.

The $500 deposited by way of security for the costs of this appeal should be paid out to the respondents

Taylor, J. : — Both parties are Indian merchant firms. The plaintiffs sued the defendants for the balance of a prewar account. The plaintiffs admitted having received the amount in Japanese currency in February 1945. They claimed to revalue this payment under the Debtor and Creditor (Occupation Period) Ordinance 1948 because, as they said, the payment was made without demand; the defendants said that the payment was demanded; thus the only issues at the trial were : — Was a demand made and, if so, was it within three months of the payment?

The writ was specially endorsed; in the particulars, credit was given for the payment, as revalued but the absence of demand was not specifically pleaded. The defence expressly pleaded that the payment was made on demand.

The first witness for the plaintiffs gave detailed evidence that no demand had been made for more than a year before the payment and he was cross-examined and re-examined on this issue. One witness for the defence said that an oral demand had been made "at the end of 1944," but he had no record of any kind to assist in fixing the date and his evidence as a whole was weak and vague.

The whole contest at the trial was on facts; there was no argument as to the onus of proof. The learned trial Judge delivered an oral judgment, of which a shorthand note was taken. He said that in the circumstances the onus of proof was on the defendants; he reviewed the material evidence and held that the testimony for the defendants did not show that any demand was made; he then gave judgment for the plaintiffs.

On appeal the main argument was that the learned trial Judge had misdirected himself on the law regarding the onus of proof of demand under this special Ordinance. This point is of some general importance at the present time.

There is no presumption of law that a demand was or was not made in any class of case.

In my opinion it is necessary for the party who claims revaluation to bring himself within the Ordinance; he must give, at the least, sufficient evidence that no demand was made within the relevant period to discharge the onus of proof which rests on him.

The nature and weight of the evidence required will vary somewhat widely in the many different circumstances in which claims for revaluation are made.

"The test is to ask which party will be successful if no evidence is given, or if no more evidence is given than has been given, at a particular point of the case, for it is obvious that as the litigation travels on the parties reach points at which the onus of proof shifts and the Court will have to say that if the case stops there, it must be decided in a particular manner." — Abrath v. North Eastern Railway Co.(1).

If this test is satisfied the Court will call on the opposite party. In that sense the onus shifts but this does not mean that the party objecting to revaluation is required to prove that a specific demand was made. It is enough if he destroys the effect of the evidence adduced by his adversary.

Where there is a conflict of evidence on this issue the final question is whether, on the case as a whole, the probability that no demand was made within three months of the payment is so high that the Judge thinks he ought to act on that view.

On the pleadings in the case before us the onus was on the plaintiffs; they accepted it without argument; they discharged it and if the defence had called no evidence, the plaintiffs must have succeeded. There was an onus on the defendants at that stage; their evidence of demand was weak and there was no evidence on which the Court could have found that the alleged oral demand was actually made within three months; they therefore failed to counter the effect of the plaintiffs' evidence.

I do not think that when the learned trial Judge said that the onus was on the defendants he was expressing his opinion on the general question of law; he was referring to the case before him at a particular stage and in those circumstances it was not a misdirection.

Reference was made to *Arunasalam v. Ng Tai Nyong*(2) where it was ruled that the defendants ought to begin but the Court of Appeal on that occasion did not examine the question of onus. That case also was in fact conducted on the principle already stated. It was an Originating Summons in which there were no pleadings. The first affidavit was insufficient to bring the case within the statute but before the hearing the plaintiffs filed a further affidavit in which it was sworn that no demand had been made; the defendants, who appeared in person, filed no affidavit but desired to adduce oral evidence of demand and the matter was accordingly adjourned into Court for their witnesses to be examined orally and cross-examined. At that stage and in those circumstances it was virtually necessary for them to begin. That case is not an authority on the onus of proof but it is consistent with the view taken in this judgment.

For these reasons I am of opinion that this appeal should be dismissed with costs.

Russell, J. : — I have had the advantage of reading the judgment of the learned Chief Justice. I agree with it and do not wish to add anything.

Appeal dismissed.

A.L.S. SADAYAPPA CHETTIAR
v.
P.C.R.ML. LETCHUMANAN CHETTIAR.

[Court of Appeal (Foster Sutton, C.J., Taylor and Wilson, JJ.) May 28, 1951]

[F. M. — Civil Appeal No. 40 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, s. 4(2)(b)(ii) — Burden of proof.

The Court following their own decision in **Abdul Hameed Mohamed Ibrahim and Company** v. **A. M. S. Nainam Sahib and Company** (reported in this issue) held that in this case the plaintiff was seeking relief which he could obtain only if he could show that the payment was made by the defendant in the circumstances set out in section 4(2)(b)(ii) of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The plaintiff is the person asserting that a certain state of facts is absent, and in order to succeed he must prove that averment positively.

Cases referred to :—

(1) *Connecticut Fire Insurance Co. v. Kavanagh* (1892) A.C. p. 473.
(2) *Abdul Hameed Mohamed Ibrahim & Co. v. A. M. S. Naimam Sahib & Co.* (1951) M.L.J. 103; 11 M.L.R. 71.
(3) *Abrath v. North Eastern Railway Co.* 11 Q.B.D. p. 452.
(4) *Shedden v. Patrick* (1869) L.R. 1 H.L. Sc. 470, 545.

APPEAL.

F. G. Charlesworth for the appellant.

W. G. W. Hastings for the respondent.

Foster Sutton, C.J. : — In this case certain property belonging to the defendant-appellant had been conveyed by him by an Indenture of Statutory Mortgage dated 6th October, 1941, to secure to the plaintiff-respondent repayment of $26,000 and interest thereon.

On the 16th of July, 1943, the appellant paid a sum of $10,000 to the respondent, and on the 25th September, 1944, he made a further payment of $16,000 in Japanese currency, together with all interest then owing under the mortgage, and the respondent then caused the property comprised in the mortgage to be